

THE PEOPLE OF THE STATE OF)	BK-10-52249 (Chapter 11)
CALIFORNIA, <i>EX REL.</i> , EDMUND G.)	Jointly Administered with:
BROWN JR., ATTORNEY GENERAL OF THE)	
STATE OF CALIFORNIA,)	10-52249 ARVCO Capital
)	Research, LLC
Appellant,)	10-52251 ARVCO Financial
)	Ventures, LLC
vs.)	10-52252 ARVCO Art, Inc.
)	
ALFRED J.R. VILLALOBOS and ARVCO)	3:10-CV-00598-ECR-RAM
CAPITAL RESEARCH, LLC, a Nevada)	
limited liability company,)	
)	<u>Order</u>
Appellees.)	
)	
)	

This case is an appeal from an order of the bankruptcy court, docketed on September 13, 2010, denying Appellant's motion to exempt the People of the State of California's enforcement action filed in California state court from the automatic stay through the police power exception contained in 11 U.S.C. § 362(b)(4). The question presented by the appeal is whether the bankruptcy court erred in finding that the People of the State of California's enforcement action is not an exercise of a governmental unit's police and regulatory power, and therefore not exempt from the automatic stay. For the reasons stated below, the bankruptcy court's order will be reversed.

I. Background

On May 5, 2010, Appellant filed a civil law enforcement action ("Enforcement Action") in Los Angeles County Superior Court against Alfred Villalobos ("Villalobos"), ARVCO Capital Research ("ARVCO"), and Federico Buenrostro, alleging a fraudulent scheme to obtain placement agent commissions by corrupting the investment decision-making process of California Public Employees' Retirement System ("CalPERS"). (Appellant's Opening Br. at 2 (#15).) The Enforcement Action alleges three causes of action: securities fraud in violation of California Corporations Code §§ 25216(a), 25403 (the "securities fraud claim"); sales of securities without a broker-dealer certificate in violation of California Corporations Code §§ 25210, 25403 (the "claim for unlicensed activities"); and unfair competition in violation of California Business and Professions Code § 17200 et seq. (the "claim for unfair competition"). (Id.)

The various claims filed in the Enforcement Action are based on allegations that Villalobos and ARVCO (collectively "Appellees") "provided various undisclosed gifts and gratuities to the decision-makers of CalPERS . . . to influence them into making investments in various private equity funds . . . in order to obtain more than \$47 million in placement agent commissions." (Id.) The Enforcement Action further alleged that Appellees made false representations to their clients to obtain payment of their commissions. (Id.) The claim for unlicensed activities is based on allegations that Appellees were unlicensed broker-dealers at the time of such activities. (Id. at 3.)

1 On the date the Enforcement Action was filed, Judge Gerald
2 Rosenberg of the Los Angeles County Superior Court, upon motion by
3 Appellant, appointed a receiver to take possession, custody, and
4 control over the assets of Appellees. (Id.) On May 28, 2010, after
5 conducting a hearing, Judge John H. Reid of the Los Angeles County
6 Superior Court confirmed the appointment of a receiver. (Id. at 4.

7 On June 9, 2010, Villalobos filed a Chapter 11 bankruptcy
8 petition in the United States Bankruptcy Court of the District of
9 Nevada for himself and the three entities controlled by him, ARVCO
10 Capital Research, LLC, ARVCO Financial Ventures, LLC, and ARVCO ART,
11 Inc. (Id.) On June 29, 2010, Appellant filed a motion to exempt
12 its Enforcement Action from the automatic stay based on the police
13 power exemption provision (the "Police Power Exemption Motion").
14 (Id. at 5.) On August 31, 2010, the bankruptcy court held a hearing
15 on the Police Power Exemption Motion. (Id. at 8.) On September 13,
16 2010, the bankruptcy court issued an order denying the Police Power
17 Exemption Motion. (Id. at 10.)

18 On September 24, 2010, Appellant filed a notice of appeal (#1)
19 with the Clerk of the bankruptcy court. (Notice of Appeal at 1
20 (#1).) The appeal was referred to this Court upon Appellant's
21 election for hearing before the United States District Court. (Id.)
22 On November 12, 2010, Appellant filed its opening brief (#15). On
23 December 2, 2010, Appellees filed their answering brief (#18). On
24 December 14, 2010, Appellant filed its reply brief (#21).

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II. Jurisdiction

United States District Courts have jurisdiction to hear appeals from "final judgments, orders, and decrees" of the bankruptcy court pursuant to 28 U.S.C. § 158(a)(1), as well as certain interlocutory orders described in 28 U.S.C. § 158(a)(2). A party may also, "with leave of the court," appeal from other interlocutory orders and decrees pursuant to 28 U.S.C. § 158(a)(3). See In re City of Desert Hot Springs, 339 F.3d 782, 787 (9th Cir. 2003) (noting that the district court must hear appeals from final decisions of the bankruptcy courts, but it is within the discretion of the district court to hear appeals of interlocutory orders).

Here, the bankruptcy court's order with respect to Appellant's motion constitutes a final order within the meaning of 28 U.S.C. § 158(a)(1) because it represents the bankruptcy court's final resolution of the parties' rights with regard to Appellant's claim. See id. at 788 (describing the Ninth Circuit's "'pragmatic' approach to deciding whether orders in bankruptcy cases are final, 'recognizing that certain proceedings in a bankruptcy case are so distinct and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right.'" (quoting In re Mason, 709 F.2d 1313, 1317 (9th Cir. 1983))). As such, we have jurisdiction over the appeal pursuant to section 158(a).

III. Standard of Review

We review the bankruptcy court's interpretation of 11 U.S.C. § 364(b)(4) and the applicability of the police power exemption *de*

1 novo. In re First Alliance Mortgage Co., 263 B.R. 99, 106 (B.A.P.
2 9th Cir. 2001).

3 4 **IV. Discussion**

5 Appellant asserts that the bankruptcy court erred in examining
6 the merits of the Enforcement Action, and that the bankruptcy court
7 misapplied the law pertaining to the pecuniary purpose and public
8 policy tests by holding that a permanent injunction or a legitimate
9 claim for injunctive relief is required before the action may be
10 exempted.

11 **A. The Police Power Exemption**

12 The issue to be resolved is whether the claims brought in the
13 Enforcement Action constitute police and regulatory power actions
14 that are exempt from the automatic stay normally applicable once a
15 debtor files for bankruptcy. See 11 U.S.C. § 362(b)(4). That
16 section provides that a governmental unit's action or proceeding "to
17 enforce the governmental unit's police and regulatory power,
18 including the enforcement of a judgment other than a money judgment"
19 is exempt from the automatic stay. Id.

20 The Ninth Circuit applies two alternative tests to determine
21 whether an action is in exercise of a governmental unit's police and
22 regulatory power. City & County of San Francisco v. PG & E Corp.,
23 433 F.3d 1115, 1123-24 (9th Cir. 2006) ("PG & E"). The tests are
24 the "pecuniary purpose" test and the "public policy" test. Id. at
25 1124. "Satisfaction of either test will suffice to exempt the
26 action from the reach of the automatic stay." Id. Under the
27 pecuniary purpose test, "the court determines whether the government
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1 action relates primarily to the protection of the government's
2 pecuniary interest in the debtor's property or to matters of safety
3 and welfare." Id. at 1124-25. Under the public policy test, "the
4 court determines whether the government seeks to 'effectuate public
5 policy' or to adjudicate 'private rights.'" Id. at 1125.

6 The bankruptcy court determined that the Enforcement Action
7 fails to satisfy either of the two applicable tests, and therefore,
8 the Enforcement Action is subject to the automatic stay.

9 **B. The Bankruptcy Court's Ruling on the Police Power Exemption**
10 **Motion**

11 1. The Merits of the Enforcement Action Should Not Be
12 Considered.

13 The bankruptcy court correctly stated that "courts perform a
14 case-by-case, fact-specific analysis as to the claims in each
15 particular action to determine whether or not they are excepted from
16 the broad reach of the automatic stay." (Appellant's Appendix (AA),
17 Bankr. Ct. Order at 20 (#15-25).) The fact-specific analysis,
18 however, should not extend to a determination of the merits and
19 legitimacy of an action.

20 In Board of Governors of Federal Reserve Systems v. MCorp
21 Financial, the Supreme Court of the United States considered the
22 argument that a court must determine whether the proposed exercise
23 of police or regulatory power is legitimate when applying 11 U.S.C.
24 § 362(b)(4). 502 U.S. 32, 40 (1991). The Supreme Court observed
25 that such an argument conflicts with the "limited authority Congress
26 has vested in bankruptcy courts." The bankruptcy court in this case
27 distinguished MCorp because the action therein was governed by the
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1 Financial Institutions Supervisory Act ("FISA"), which expressly
2 precluded review. Id. at 44. While the bankruptcy court is correct
3 that the holding in MCorp is not expressly applicable to this case,
4 the Supreme Court's observation that bankruptcy courts should not
5 determine the legitimacy of a governmental unit's police power
6 action when applying 11 U.S.C. § 362(b)(4) has been adopted by the
7 Ninth Circuit in cases without express congressional preclusion of
8 review as in MCorp.¹

9 In PG & E, the Ninth Circuit stated that "[t]hrough various
10 provisions of the Bankruptcy Code, Congress has evidenced its intent
11 that a governmental unit's police or regulatory action not be
12 litigated in federal bankruptcy court." 433 F.3d at 1127. The
13 Ninth Circuit acknowledges, as the bankruptcy court in this case
14 has, that the determination of whether a particular governmental
15 action qualifies as a police or regulatory action "must be made on
16 the basis of a case-specific inquiry." Id. That inquiry, however,
17 does not extend to determining whether the action is meritorious in
18 the manner that the bankruptcy court herein has done. In our view,
19 and according to Ninth Circuit precedent, the inquiry turns upon the
20 two tests, pecuniary purpose and public policy, which we examine in
21 a later section. Those tests, however, do not require that the
22 bankruptcy court delve into witness depositions and evidence as to
23 the legitimacy of the government's case. They merely require
24 examination of the allegations of the government's case, to

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26 ¹ Furthermore, Appellees acknowledge that "MCorp stands for the
27 simple proposition - not disputed by the Debtors - that courts should
28 not examine the legitimacy of a proposed exercise of a governmental
unit's police or regulatory power."

1 determine whether the action has more of a private or pecuniary
2 nature, or a public one.

3 We do not believe that the bankruptcy court should,
4 essentially, adjudicate the merits of a state court action that is
5 pending in a different court, and determine whether the government
6 is entitled to relief and thereby grant or deny exemption from the
7 automatic stay. The proper forum for determining the merits of the
8 case is the court in which that action is brought. The bankruptcy
9 court is not authorized, as the Supreme Court noted in MCorp, to
10 make such determinations. See MCorp, 502 U.S. at 40; see also PG &
11 E, 433 F.3d at 1127. If the action, through an objective but case-
12 specific inquiry, is determined to be exempt from the automatic
13 stay, the state court will doubtless examine the legitimacy of the
14 government's case through standard procedures such as motions to
15 dismiss and motions for summary judgment.

16 In this case, the bankruptcy court noted that "the AG fails the
17 public purpose test because it is seeking monetary relief for
18 CalPERS, not for creditors of the estates." (AA, Bankr. Ct. Order at
19 21 (#15-25).) While we disagree with the conclusion regarding the
20 public purpose test, we find that the bankruptcy court made the
21 proper inquiry to determine whether the Enforcement Action should be
22 exempt from the automatic stay when it examined the specific
23 allegations and facts of the Enforcement Action. However, the
24 bankruptcy court erred in observing that "the sworn deposition
25 testimony of CalPERS' own witnesses exposes the misrepresentations
26 contained in the AG's allegations. As such, no proper purpose of
27 any kind can be served by allowing the AG to pursue those claims in
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1 state court.” (Id. at 22.) This type of inquiry into the merits and
2 legitimacy of the Enforcement Action is not proper, and should not
3 have been part of the bankruptcy court’s decision in disallowing the
4 automatic stay exemption. Such inquiries are littered in the
5 bankruptcy court’s decision. For example, the bankruptcy court
6 stated that “[i]t is also clear from the CalPERS witnesses’
7 testimony that nothing Mr. Villalobos is alleged to have done
8 affected CalPERS’ investment decisions or caused them damages of any
9 kind” (Id. at 23.) These observations led to the
10 bankruptcy court’s conclusion that “the AG’s assertion that Mr.
11 Villalobos committed any violation of section 25216(a) of the
12 California Corporations Code or section 17200 of the Business and
13 Professions Code has no merit.” (Id.)

14 We do not believe that the bankruptcy court’s inquiry into the
15 merits of the Enforcement Action should have been a deciding factor
16 in its decision to deny exemption from the automatic stay. This
17 error alone would, in our view, require that we reverse the
18 bankruptcy court’s decision. However, we must also address the
19 additional errors that Appellant argues were made by the bankruptcy
20 court in deciding the Police Power Exemption Motion.

21 2. Urgent Need to Prevent Imminent Harm is Not Required
22 for the Police Power Exemption.

23 We disagree with the bankruptcy court’s determination that the
24 police power exemption only applies to actions which are urgently
25 needed to protect public safety and health. The bankruptcy court
26 based its ruling on In re Four Winds Enterprises, Inc., in which the
27 bankruptcy court of the Southern District of California stated that

1 "[c]ourt decisions construing the exemption have narrowed it to
2 those exercises of police power which are urgently needed to protect
3 the public health and welfare." 87 B.R. 624, 629 (Bankr. S.D. Cal.
4 1988) (citing In re IDH Realty, Inc., 16 B.R. 55, 57 (Bankr.
5 E.D.N.Y. 1981)). The Ninth Circuit Court of Appeals, however, has
6 never held that an urgent need, or the prevention of ongoing or
7 future harm, is required for an exemption from the automatic stay.
8 In fact, the Ninth Circuit has affirmed exemptions in cases where
9 there have only been past violations. See, e.g., In re Berg, 230
10 F.3d 1165, (9th Cir. 2000) (affirming the exemption of sanctions for
11 frivolous conduct from the automatic stay).

12 The Fifth Circuit Court of Appeals confronted the argument that
13 the police power exemption is "limited to those situations where
14 'imminent and identifiable harm' to the public health and safety or
15 'urgent public necessity' is shown." Matter of Commonwealth Oil
16 Refining Co., Inc., 805 F.2d 1175, 1184 (5th Cir. 1986), *cert.*
17 *denied*, 483 U.S. 1005 (1987). The Fifth Circuit held that 11 U.S.C.
18 § 362(b)(4) "does not limit the exercise of police or regulatory
19 powers to instances where there can be shown imminent and
20 identifiable harm or urgent public necessity." Id. In Oil
21 Refining, appellants argued, as Appellees do in our case, that
22 legislative history indicating that § 362(b)(4) is "intended to be
23 given a narrow construction in order to permit governmental units to
24 pursue actions to protect the public health and safety and not to
25 apply to actions by a governmental unit to protect a pecuniary
26 interest in property of the debtor or property of the estate." Id.
27 at n.7 (citing 124 Cong. Rec. H11089). The Fifth Circuit stated
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1 that the floor statement that § 362(b)(4) should be construed
2 narrowly applies, by its language, only to actions which are "aimed
3 at protecting the government's monetary interest." Id. at n.7. The
4 Eighth Circuit Court of Appeals agrees with the Fifth Circuit's
5 conclusion that imminent and identifiable harm or urgent public
6 necessity is not required for the police power exemption, and
7 nothing in the statute or the legislative history is to the
8 contrary. In re Commonwealth Companies, Inc., 913 F.2d 518, 522
9 (8th Cir. 1990).

10 All of the cases relied upon by the bankruptcy court are lower
11 court decisions that have been "roundly criticized." Matter of
12 Scott Housing Sys., Inc., 91 B.R. 190, 193 n.2 (Bankr. S.D. Ga.
13 1988). While there is no Ninth Circuit case directly on point, we
14 are satisfied that the Eighth Circuit and Fifth Circuit holdings are
15 more persuasive than the cases the bankruptcy court cited in its
16 decision. Therefore, we conclude that the bankruptcy court erred in
17 determining that the police power exemption should only be granted
18 for actions that are urgently needed to protect public health and
19 welfare.

20 3. Injunctive Relief is Not Required for the Police Power
21 Exemption.

22 Nor do we find that ongoing or future harm is required for
23 exemption from the automatic stay. Punishment for past conduct is
24 part of a governmental unit's police power. See, e.g., Penn Terra
25 Ltd. v. Dep't of Env'tl. Res., Commonwealth of Pennsylvania, 733 F.2d
26 267, 274 n.7 (3d Cir. 1984). Punishment in the form of civil
27 penalties, disgorgement, and restitution serves a public, rather
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1 than a pecuniary, purpose. See, e.g., PG & E, 433 F.3d at 1125. We
2 are unable to find binding decisions that discuss the necessity of
3 ongoing or future harm, and therefore, hold that the bankruptcy
4 court erred in giving considerable weight to the apparent lack of
5 future harm. For instance, the bankruptcy court noted that "because
6 ARVCO Capital has not operated since 2008 . . . [p]ermitting these
7 claims to go forward in the state court would not prevent ongoing or
8 future violations of law, nor would it protect any public safety or
9 health purpose or effectuate public policy." (AA, Bankruptcy Ct.
10 Order at 21 (#15-25).) This blanket statement seems to imply that
11 there is no public benefit in punishment and deterrence of
12 fraudulent behavior that harms the public. Surely, punishment of
13 fraudulent and criminal behavior serves the purpose of providing at
14 least some deterrence of future fraudulent and criminal behavior.
15 See, e.g., In re Charter First Mortgage., Inc., 42 B.R. 380, 384
16 (Bankr. Or. 1984) ("The authority to protect the public welfare
17 would be largely meaningless without the power to punish and
18 prevent."). The circumstance that the defendants in the Enforcement
19 Action have apparently ceased fraudulent behavior does not lead to
20 the conclusion that a governmental unit's action against the
21 defendants' past behavior is moot or irrelevant to public welfare.

22 Furthermore, we note that the Enforcement Action does seek
23 injunctive relief against the defendants to prevent the defendants
24 from engaging in any conduct violating the laws relating to
25 unlicensed activities and unfair competition and securities fraud.
26 While the bankruptcy court seems to have concluded that such relief
27 is moot because Appellees have already ceased any objectionable
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1 activities, we do not think that the court should have considered
2 evidence regarding the merits and necessity of injunctive relief.
3 Whether Appellees' current activities are sufficient to rule out the
4 necessity for a permanent injunction should be determined in the
5 Enforcement Action. See, e.g., Charter, 42 B.R. at 384. Even if
6 the need for injunctive relief is indeed moot, the absence of
7 injunctive relief does not take the Enforcement Action outside of
8 the police power exemption. In re Commonwealth Companies, Inc., 913
9 F.2d 518, 522 (8th Cir. 1990).

10 3. Civil Penalties, Disgorgement, and Restitution Remedies
11 Do Not Convert a Governmental Unit's Police Power Action into a
12 Pecuniary Action.

13 In addition, the bankruptcy court stated that the Enforcement
14 Action fails the pecuniary purpose test because the Attorney General
15 seeks disgorgement, civil penalties, and restitution. (AA, Bankr.
16 Ct. Order at 23 (#15-25).) We disagree. In In re Berg, the Ninth
17 Circuit Court of Appeals rejected the argument that an award of
18 sanctions for frivolous conduct inures to the benefit of a private
19 party and therefore fails the pecuniary purpose test as being
20 "overly-literal." 230 F.3d 1165, 1168 (9th Cir. 2000). The Ninth
21 Circuit stated that several cases have rejected this argument; for
22 example, the Ninth Circuit cites a bankruptcy court decision
23 "not[ing] that although private parties may benefit financially from
24 sanctions, the deterrent effect of monetary penalties can be
25 essential for the government to protect its regulatory interests."
26 Id. (citing O'Brien v. Fischel, 74 B.R. 546, 551 (D. Hawaii 1987)).
27 In O'Brien, the bankruptcy court noted that "a proceeding resulting
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1 in a monetary penalty may be excepted from the automatic stay as
2 much as one resulting in a prison sentence or injunctive relief”
3 because of the deterrent effect of such penalties. 74 B.R. at 551.

4 Disgorgement, civil penalties, and restitution all satisfy a
5 public purpose and the seeking thereof does not convert the action
6 into one that fails the pecuniary purpose test. The Ninth Circuit
7 Court of Appeals observed that “[d]isgorgement is designed to
8 deprive a wrongdoer of unjust enrichment, and to deter others from
9 violating securities laws by making violations unprofitable.” Sec.
10 Exch. Comm’n v. First Pacific Bancorp, 142 F.3d 1186, 1191 (9th Cir.
11 1998). While disgorgement may inure to the benefit of CalPERS, the
12 Ninth Circuit concluded that the primary purpose of disgorgement is
13 to deprive the wrongdoer of ill-gotten gains, and to “deter others
14 from violating securities laws by making violations unprofitable.”
15 Id.

16 Civil penalties, like disgorgement, also serve a public, rather
17 than a pecuniary, purpose. The California Supreme Court noted that
18 civil penalties are “a means of securing obedience to statutes
19 validly enacted under the police power.” Hale v. Morgan, 149 Cal.
20 Rptr. 375, 398 (Cal. 1978). The bankruptcy court in this case noted
21 that the “AG primarily seeks pecuniary relief” and further
22 elaborated that “[f]or example, the AG’s prayer for civil penalties
23 seeks ‘not less than [sic] \$25 million.’” (AA, Bankr. Ct. Order at
24 23 (#15-25).) The amount of the civil penalties sought does not
25 convert the purpose of civil penalties from punishment, deterrence,
26 protection of the public into a private and pecuniary one.

1 As for restitution, PG & E controls. The Ninth Circuit stated
2 that:

3 [r]estitution will benefit the public
4 welfare by penalizing past unlawful conduct
5 and deterring future wrongdoing. There is
6 no showing that the restitution claims
7 primarily advance the governments' pecuniary
8 interests. In these circumstances, the
9 restitution claim fits comfortably within
10 section 362(b)(4)'s "police or regulatory
11 power."

12 PG & E, 433 F.3d at 1125.

13 In sum, the bankruptcy court's conclusion that the Enforcement
14 Action fails the pecuniary purpose test because it seeks
15 disgorgement, civil penalties, and restitution was incorrect.

16 **C. The Enforcement Action Satisfies the Pecuniary Purpose Test,**
17 **and Therefore, is Exempt From the Automatic Stay.**

18 Each of the three claims in the Enforcement Action passes the
19 pecuniary purpose test, and therefore the entire Enforcement Action
20 is exempt from the automatic stay. As noted above, the Ninth
21 Circuit applies two tests, the pecuniary purpose test and the public
22 policy test, to determine whether a governmental action fits within
23 the police power exemption. PG & E, 433 F.3d at 1123-24.

24 Satisfaction of either test will suffice to exempt the action from
25 the automatic stay. Id. at 1124. Because we determine that the
26 Enforcement Action satisfies the pecuniary purpose test, we decline

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1 to consider in depth whether the Enforcement Action satisfies the
2 public policy test.

3 Under Ninth Circuit law, "[i]f the action primarily seeks to
4 protect the government's pecuniary interest, the automatic stay
5 applies. If the suit primarily seeks to protect the public safety
6 and welfare, the automatic stay does not apply." Id. (citing In re
7 Universal Life Church, Inc., 128 F.3d 1294, 1297 (9th Cir. 1997)).

8 We examine each claim separately to determine whether it
9 satisfies the pecuniary purpose test, as required by PG & E. See PG
10 & E, 433 F.3d at 1124.

11 1. The Securities Fraud Claim Satisfies the Pecuniary
12 Purpose Test.

13 Plaintiff's claim for securities fraud, brought under
14 California Corporations Code section 25216(a) and section 25403,
15 satisfies the pecuniary purpose test because the claim does not
16 "relate[] primarily to the protection of the government's pecuniary
17 interest in the debtor's property." PG & E, 433 F.3d at 1124-25.
18 Instead, the action relates to "matters of safety and welfare." Id.
19 at 1125. The Ninth Circuit stated that "[w]hen the Commission sues
20 to enforce the securities laws, it vindicates public rights and
21 furthers the public interest." Sec. Exch. Comm'n v. Rind, 991 F.2d
22 1486, 1491 (9th Cir. 1993). The fact that the government sought
23 disgorgement did not change the public purpose of the securities
24 fraud claim. Id. In Rind, the Ninth Circuit observed that the
25 purpose of disgorgement in securities fraud cases is to "deprive the
26 wrongdoer of his or her unlawful profits and thereby eliminate the
27 incentive for violating the securities laws. The theory behind the

1 remedy is deterrence and not compensation." Id. Appellant is not
2 acting to protect its own pecuniary interest in the debtor's
3 property, and therefore the securities fraud claim should be exempt
4 from the automatic stay as a police power action.

5 2. The Claim for Unlicensed Activities Satisfies the
6 Pecuniary Purpose Test.

7 The claim for unlicensed activities, brought under California
8 Corporations Code section 25210 and 25403, also satisfies the
9 pecuniary purpose test, and should be exempt from the automatic
10 stay. In In re Poule, the Bankruptcy Appellate Panel of the Ninth
11 Circuit confronted a debtor charged with violations of the
12 Contractor's Licensing Law, and found that the Contractor's
13 Licensing Law "is a legitimate exercise of California's police power
14 and the acts involved in this case are of a type the state has a
15 legitimate interest in punishing and preventing." 91 B.R. 83, 87
16 (B.A.P. 9th Cir. 1988). The Bankruptcy Appellate Panel concluded
17 that civil penalties in that action fell within the police power
18 exemption of section 362(b)(4). Id.

19 We conclude that the claim for unlicensed activities in this
20 case likewise relates primarily to matters of public safety and
21 welfare, rather than relating primarily to protection of Appellant's
22 pecuniary interest in the debtors' property, and should be exempt
23 from the automatic stay.

24 3. The Claim for Unfair Competition Satisfies the
25 Pecuniary Purpose Test.

26 The claim for unfair competition, brought under California
27 Business and Professions Code section 17200, satisfies the pecuniary
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1 purpose test. In PG & E, the Ninth Circuit examined an action
2 brought pursuant to California's Unfair Competition Law. 433 F.3d
3 at 1125. The Ninth Circuit found that the restitution claims in
4 that action "will benefit the public welfare by penalizing past
5 unlawful conduct and deterring future wrongdoing." Id. The Ninth
6 Circuit noted that since the action satisfies the pecuniary interest
7 or pecuniary purpose test, it is unnecessary to reach the question
8 of the public policy test. Id. However, the Ninth Circuit did
9 consider that test in conjunction with the pecuniary purpose test,
10 and found that "a civil action brought by a governmental entity
11 under section 17200 'is fundamentally a law enforcement action
12 designed to protect the public and not to benefit private parties.'" Id.
13 at 1125-26 (quoting People v. Pacific Land Research Co., 569
14 P.2d 125, 129 (Cal. 1977)). There is no showing that the unfair
15 competition claim in our case is distinguishable from that in PG &
16 E. The restitution, disgorgement, and civil penalties requested in
17 the Enforcement Action will not inure to the benefit of the
18 government. We discussed in detail the law concerning whether such
19 monetary penalties serve a private, rather than a public, purpose,
20 and note again that the fact that such penalties may result in money
21 being paid to private parties does not change the fact that "the
22 section 17200 restitution claims filed by the governmental entities
23 in this case are fundamentally law enforcement actions designed to
24 protect the public" and therefore satisfy the public policy test.
25 Id. at 1126.

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1 4. The Enforcement Action Does Not Primarily Seek to
2 Adjudicate Private Rights.

3 Because we conclude that each of the claims in the Enforcement
4 Action satisfies the pecuniary purpose test, we did not previously
5 discuss the bankruptcy court's conclusion that "those individuals
6 whose pensions are maintained by CalPERS are a 'select group of
7 individuals,' not the public." (AA, Bankr. Ct. Order at 15 (#15-
8 25).) The bankruptcy court further noted that "[t]he mere fact that
9 CalPERS is a large organization does not transform CalPERS from a
10 private party to society at large." (Id.) We disagree with the
11 bankruptcy court's conclusion that the AG is basically litigating on
12 CalPERS' behalf, rather than on behalf of the public. Laws
13 governing securities fraud, unlicensed activities, and unfair
14 competition are directed at addressing public harms. The fact that
15 a specific violation of those laws directly harms only a certain
16 group in one instance does not transform governmental actions
17 seeking redress, punishment, and deterrence into private actions for
18 pecuniary advantage.

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20 **V. Conclusion**

21 The bankruptcy court erred in concluding that the Enforcement
22 Action is not a police power action within the meaning of 11 U.S.C.
23 § 362(b)(4) after improperly examining the merits of the Enforcement
24 Action and concluding that the purpose of the Enforcement Action is
25 primarily pecuniary. Because each of the claims in the Enforcement
26 Action are brought to protect public safety and welfare, rather than
27 to protect Appellant's pecuniary interest in Appellees' property,

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1 the Enforcement Action is a police power action within the meaning
2 of 11 U.S.C. § 362(b)(4) and should be exempt from the automatic
3 stay.

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5 **IT IS, THEREFORE, HEREBY ORDERED** that the bankruptcy court's
6 Order of September 13, 2010 denying Appellant's Police Power
7 Exemption Motion is **REVERSED** and the matter is **REMANDED** to the
8 bankruptcy court for further proceedings not inconsistent with this
9 Order.

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11 The Clerk shall enter judgment accordingly.

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14 DATED: June _24th_, 2011.

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16 UNITED STATES DISTRICT JUDGE